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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 719

CONVOY COMPANY, INC.,

Appellant,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,

Appellees,

COMMERCIAL CARRIERS, INC.

Intervening Appellee.

BRIEF IN SUPPORT OF MOTION TO AFFIRM

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Intervening Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF IN SUPPORT OF MOTION TO AFFIRM

Intervening Appellee, Commercial Carriers, Inc., files this its Brief in Support of its Motion to Affirm the Judgment and Order of the three-judge Federal Court, review of which is sought in the proceeding above captioned, and in support thereof respectfully shows:

I. DECISION FOR REVIEW

The final order and judgment of the United States District Court for the District of Oregon, entered on July 20, 1965, and here sought to be reviewed by Appellants is appended to Appellant's Jurisdictional Statement identified as Appendix "A" thereto.

II. APPELLATE JURISDICTION

The jurisdiction of this Court to review such final order and judgment is acknowledged by this Intervening Appellee.

III. INVOLVED STATUTES

The Federal statutes involved are:

1. The Interstate Commerce Act, 49 U.S.C.A. 301 (307).

2. The Administrative Procedure Act, 5 U.S.C.A. 1001 (1007 b).

IV. QUESTIONS PRESENTED FOR REVIEW

1. Whether the questions on which the decision of the cause depends are so unsubstantial as not to need further argument considering the prior decision of this Court in *The Motor Convoy, Inc. v. United States*, 235 F. Supp. 250, affirmed *per curiam* 381 U. S. 436. This Intervening Appellee says: "Yes!"

2. Whether the three-judge Court committed reversible error in refusing to set aside order of the Interstate Commerce Commission in Docket MC 43038, Sub 415, dated December 23, 1964, and

April 16, 1965. This Intervening Appellee says: "No!"

V. STATEMENT OF THE CASE

The final order and judgment of the United States District Court, District of Oregon, entered on July 20, 1965, and here sought to be reviewed by Appellant, dismissed a complaint brought to set aside orders of the Interstate Commerce Commission (J. S. App. B). The Commission's orders granted the petition of Intervening Appellee, Commercial Carriers, Inc. for modification of its present common carrier certificate, No. MC 43038, Sub 415, to the extent that, under the modified certificate, Commercial Carriers, Inc. was authorized to continue to transport Chrysler Corporation traffic it had previously handled in through truckaway service from Detroit, Michigan to points in Oregon, by means of truckaway service, ex-rail, from Portland, Oregon, to points in Oregon.

The District Court unanimously sustained the Commission's orders and found that "the orders of the Commission, dated December 17, 1964, and April 7, 1965, issued in its Docket No. MC 43038 (Sub No. 415), Commercial Carriers, Inc. Petition for Modification of Existing Certificate, are supported by substantial evidence and are not arbitrary or capricious," (J. S. App. A) and that the decision in *Motor Convoy, Inc. v. United States*, 235 F. Supp. 250, affirmed *per curiam* 381 U. S. 436, "is persuasive" (ibid).

ARGUMENT

The questions presented for review in the instant proceeding have all been considered by this Court in *The Motor Convoy, Inc. v. United States, supra.* The facts in *Motor Convoy* are almost identical to the facts in the instant proceeding. In *Motor Convoy* this Court gave its approval to the procedure for modification of certificates set down by the Interstate Commerce Commission in *National Automobile Transporters Association—Declaratory Order*, 91 M.C.C. 395. Intervening Appellee, Commercial Carriers, Inc., complied with this procedural criteria to the letter, in the same manner as Dixie Transport Company complied in the *Motor Convoy* case. Appellant does not even attempt to distinguish the instant case on the facts from the situation in *Motor Convoy* other than to allege that the volume of traffic in the instant situation was not as great nor did it involve as great a percentage of petitioners' total volume as was involved with Dixie Transport. Appellant is actually requesting the Court to directly reverse its decision in *Motor Convoy*, without distinguishing it, and to determine collaterally that the procedure set forth in *National Automobile Transporters Association—Declaratory Order, supra*, are violative of the Administrative Procedure Act (5 U.S.C. 1001, 1004 (a)(b) and 1006 (c) and 1007 (b).

Part II of the *Interstate Commerce Act*, 49 Stat. 543, 49 U.S.C.A. 301-327, establishes the power of the Interstate Commerce Commission to issue Certificates of Public Convenience and Necessity authorizing motor carriers to engage in the transportation of passengers and property in interstate or foreign commerce. The provisions of the Act and, in particular, the provisions of Section

207(a), 49 U.S.C.A. 307(a), established certain statutory criteria to be met before a Certificate of Public Convenience and Necessity may be issued by the Commission and, where such criteria are met, "a Certificate shall be issued to any qualified applicant therefor".

The Act is silent, however, with respect to the procedure to be employed by the Commission in the receipt of evidence which would tend to prove or disprove that an applicant for a Certificate of Public Convenience and Necessity was a qualified applicant and met the criteria of Section 207(a), namely, the applicant's fitness, willingness, and ability to provide the proposed service in conformity with the provisions of the Act and the regulations of the Commission and the fact that the present or future public convenience and necessity required such certification in whole or in part. Discretion is left with the Commission to determine the necessary procedures in its administration of the provisions of the Act.

This Court has given recognition to the discretionary power of the Commission to establish procedural criteria in exercising its discretionary judgment to determine whether an applicant for operating authority has met the statutory requirements of Section 207(a). *United States v. Pierce Auto Freight Lines*, 327 U. S. 515, 535-36 (1946); *Interstate Commerce Commission v. Parker*, 326 U. S. 60, 65 (1945).

The *Administrative Procedure Act*, 5 U.S.C.A. 1001, imposes no further limitation upon the Commission than the requirement that notice of the filing of an application for a Certificate of Public Convenience and Necessity be given to the general public with an opportunity afforded to interested parties to present their views and evidence in support of their views. Neither statute requires the Com-

mission to hold a public hearing merely because one is requested by an interested party.

Neither the *Administrative Procedure Act* nor the *Interstate Commerce Act*, requires the Interstate Commerce Commission to hold an oral hearing where, in the judgment of the Commission, all of the evidentiary facts upon which the issues of law can be determined are capable of presentation in the pleadings. *United States v. Storer Broadcasting Co.*, 351 U. S. 192, 205 (1956). As will be noted hereinafter, there is no factual dispute in the Commercial Carriers, Inc. proceeding in Docket No. MC-43038, Sub No. 415 which decision is here sought to be reviewed. There is no evidence of record that the affording of an oral hearing as requested by Appellant would have produced any factual evidence beyond that fully considered by the Commission in its disposition of petition of Commercial Carriers, Inc., for modification of its certificate. The allegations of fact presented by protestant Convoy Company were admitted by petitioner Commercial Carriers, Inc., and the facts stated by affidavit of the president of Commercial Carriers were not controverted by protestant in any of its protests, replies or petitions, nor are the facts presented therein disputed in this appeal.

As a result of a petition filed with the Commission on June 27, 1960, by National Automobile Transporters Association, the Commission established certain procedures to be followed by motor carriers of new automobiles seeking modification of their then held operating authorities in order to enable them to coordinate their services with rail carriers in trailer-on-flatcar or multi-level car service. Upon receipt of the petition, the Commission gave it Docket No. MC-C-3024, gave public notice of the filing of the petition, received pleadings and briefs from interested

parties, including the Appellant in the instant litigation, held a hearing for the receipt of testimony and documentary evidence, issued a tentative report, accepted further responsive pleadings, and ultimately issued its Report and Order in MC-C-3024, entitled "*National Automobile Transporters Association—Declaratory Order*" on October 15, 1962, reported in 91 M.C.C. 395. Judicial review of the latter decision has never been sought by the Appellant in the instant litigation, nor by any other party.

In the *National Automobile Transporters Association—Declaratory Order* case, *supra*, the Commission found that motor carriers of automobile traffic holding "initial" authority could not transport such traffic from a rail terminus, without modification of such operating authority so as to permit "secondary" operating authority within the meaning of those terms as defined in *Administrative Ruling No. 75*, promulgated by the Commission's Bureau of Motor Carriers in 1938 and thereafter followed by the Commission in numerous decisions. The Commission further found that without such modification many carriers were faced with a loss of the traffic which they were then enjoying by reason of the intervention of rail TOFC and tri-level car service; that this would have disastrous economic effects; and that it was in the public interest to permit modification of such certificates in those instances where a carrier could show by petition to the Commission that it had been engaged in the movement of traffic; that it had lost the traffic because of rail intervention, and that the traffic was still available for movement by the applicant in the event of such modification.

Commercial Carriers' petition for modification of its certificate in Docket No. MC-43038, Sub No. 415 met the criteria or procedural methods suggested by the Commission in *National Automobile Transporters Association—De-*

claratory Order and a finding to this effect is contained in the Commission's order of April 7, 1965.

In this order of April 7, 1965, the Commission, Division 1, acting as an Appellate Division, recognized the decision of the three judge Federal Court in *The Motor Convoy, Inc. et al. v. U. S. et al.*, 235 F. Supp. 250, which was subsequently affirmed per curiam by this Court, 381 U. S. 436, which in turn recognized the controlling effect of the Commission's findings in the *National Automobile Transporters Association—Declaratory Order* case as justification for its action in Commercial's Petition for Modification.

Appellant argues that the limited modification authorized by the Commission is equivalent to the issuance of a new certificate and, therefore, requires a new proof of the need for the service; i.e. proof of public convenience and necessity. The District Court in *Motor Convoy, supra* at 253, met an identical argument head on and stated: "The need for the transportation by [applicant] had previously been established and [applicant] had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way." The District Court further found that where the existing carriers such as Appellant herein are concerned, they "would not be affected by the situation" (ibid), since no new service in competition with such carriers is authorized by the modification.

Disregarding the relative merits of the positions of Commercial Carriers, Inc. and Convoy Company in the original petition, the Appellant here would seek reversal of the Commission's action on the technical contention that the Commission went beyond its statutory authority in granting relief to the Petitioner without making adequate findings. However, this Court has found that it is sufficient on judicial review if the findings of the Commission, considered in composite, express in clear and understanding manner the Commission's conclusion. *Alabama Great Southern Railway Co. v. United States,* 340 U. S. 216, 95 L. Ed. 225, 71 S. Ct. 264.

While it might appear that Appellants in the instant litigation are merely attacking the action of the Interstate Commerce Commission in the Commercial Carriers, Inc. Petition and the affirmance of that action by the three-judge District Court, in actuality the Appellants are attacking the procedural criteria established by the Commission in *National Automobile Transporters Association —Declaratory Order* as is evidenced by one of the concluding paragraphs in Appellant's jurisdictional statement appearing on Pages 19 and 20 thereof. Appellants there take the position that all motor carriers holding "secondary" operating authority to transport motor vehicle traffic are in jeopardy if this type of certificate modification by the Commission is allowed to stand. This attempt to secure judicial review of the Commission's decision in the *National Automobile Transporters Association—Declaratory Order* case should be rejected. The decision of the three-judge District Court should be affirmed.

VII. CONCLUSION

For the reasons indicated, this intervening Appellee, Commercial Carriers, Inc., respectfully prays that its Motion to Affirm the judgment of the three-judge District Court be granted.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF SERVICE

I, Donald W. Smith, attorney for Commercial Carriers, Inc., Intervening Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of December, 1965, I served copies of the foregoing Motion to Affirm and Brief in Support of Motion upon all parties of record in this proceeding by first class air mail, postage prepaid, as follows:

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